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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALLIED-BRUCE TERMINIX COMPANIES, INC., and
TERMINIX INTERNATIONAL COMPANY,

Petitioners,

—v.—

G. MICHAEL DOBSON, WANDA C. DOBSON,
STEVEN GWIN and JAN GWIN,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF AMERICAN ARBITRATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.4 of the Rules of this Court, the American Arbitration Association ("AAA" or the "Association") hereby respectfully moves for leave to file the annexed brief as *amicus curiae*. Petitioners' written consent to such filing has been obtained. The consent of Respondents was requested but refused.

The AAA is an educational, membership organization incorporated in 1926 and operating under the Not-for-Profit Corporation Law of the State of New York. The Association is dedicated to the dissemination of knowledge throughout the United States and other countries regarding arbitration and other alternative mechanisms for resolving disputes. The AAA does not act as an arbitrator of disputes; rather, it provides impartial rules,

procedures, and administrative assistance to parties desiring to use its neutral facilities.

This case raises an issue that has long occupied state and lower federal courts in the United States—the scope of applicability of the Federal Arbitration Act, 9 U.S.C. §§ 1-16. The issue is particularly important with respect to controversies arising in states, such as Alabama in the present case, that view arbitration with suspicion. As the leading arbitration institution in the United States, the AAA promotes arbitration as a relatively speedy, efficient, and inexpensive method of resolving disputes. Litigation about litigation, or about litigation versus arbitration, is inconsistent with the promise of arbitration and with the efforts of the Association. The AAA accordingly has a strong interest in seeing that uncertainty about the reach of the Federal Arbitration Act is removed, so that parties to a dispute can know whether or not they are required to arbitrate, and so that parties who desire to have their contracts subject to arbitration can know what type of provisions to include in their contracts.

The AAA has no interest in the outcome of the underlying dispute between the home owner and the termite protection company. The arbitration clause at issue, however, was based on the standard clause contained in the Commercial Arbitration Rules pamphlet published by the AAA. The Association views with concern any possibility that this Court might change direction from its strong support of arbitration over the past two decades, regardless of whether the arbitration in any particular case is to be administered by the AAA, as here, or by another organization, as in three of the four previous cases in which the AAA has filed a brief as *amicus curiae*. *See Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (National Association of Securities Dealers); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Japan Commercial Arbitration Association); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (International Chamber of Commerce); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (AAA).

The AAA is uniquely in a position to offer information gathered in the course of its extensive experience in the administration of arbitration. In addition, the AAA is able to bring its perspective to the broader issues concerning the direction of the development of federal arbitration law by this Court and by Congress. Petitioners did not extensively address these issues in their petition for certiorari, and the AAA has no reason to believe that they will do so in their brief on the merits.

WHEREFORE the American Arbitration Association respectfully moves this Court for leave to file the annexed brief as *amicus curiae* in support of petitioner.

Respectfully submitted,

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BRIEF OF AMERICAN ARBITRATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

The interest of *amicus curiae* American Arbitration Association ("AAA" or the "Association") is set forth in the motion for leave to file this brief, which is bound herewith pursuant to Rule 37.4 of this Court.

SUMMARY OF ARGUMENT

This Court has issued rulings in favor of arbitration in an unbroken series of cases for more than a quarter century. Only a major shift in direction for the Court could sustain the decision below.

This Court's prior decisions, the plain words of the Arbitration Act and the legislative history of that Act indicate that Congress intended to extend the Act to the full reach of its powers

to regulate interstate and foreign commerce. More recently, Congress has repeatedly reconfirmed its support for arbitration as a means of dispute settlement in commercial disputes. Apart from hostility to arbitration, which this Court has decisively rejected, the Alabama Supreme Court's construction of the Act has no discernible basis in history or logic.

The evidence is overwhelming that arbitration is fair and efficient. Arbitration not only relieves overcrowded courts of unnecessary burdens but it provides resolution of disputes without distorting justice.

The standard applied by the Alabama Supreme Court in the present case to measure the scope of the Federal Arbitration Act invites pre-arbitration litigation about disputes. The only way to give effect to the congressional intent to allow parties to choose arbitration as a speedy and economical means of resolving disputes is to make clear that the reach of the Arbitration Act is coextensive with the powers of Congress under the Commerce Clause.

ARGUMENT

I.

Since 1967 This Court Has Consistently Rejected All Attempts To Restrict Enforcement of Agreements To Arbitrate.

Beginning in 1967, this Court has consistently upheld agreements to arbitrate. In an unbroken series of decisions since that time, this Court has repudiated the ambivalence to arbitration that it displayed forty years ago in *Wilko v. Swan*, 346 U.S. 427 (1953). In *Wilko*, the Court invalidated an agreement to arbitrate in a contract between a securities brokerage firm and its customer, essentially on the ground that arbitration could not assure to the customer the kind of protection granted to investors by the Securities Act of 1933, 15 U.S.C. §§ 77a–77aa. Not only has this Court expressly overruled *Wilko* in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), but it has

consistently stressed that arbitration is a fair system of dispute resolution, that arbitrators are equipped to decide complex as well as simple controversies, that they can be authorized to pass on statutory as well as common-law claims, and that if there is a question about the validity of a contract containing an agreement to arbitrate, that question is to be decided by the arbitrators.

First, this court has, in a series of cases, made clear that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), this Court held that a challenge to the validity of a contract containing an arbitration clause was a question for the arbitrators, not the court, and rejected the argument that the arbitrators would be without jurisdiction without a valid contract. Any other decision would have seriously diminished the value of arbitration by requiring essentially two trials: litigation in court about contract validity, followed by arbitration about breach and damages. In deciding as it did, the Court stated that

> we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.

388 U.S. at 404.

This Court extended the reasoning of *Prima Paint* in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), in which one party asserted that the other party had waived its right to arbitrate. The Court rejected the application of a state-law waiver standard and held that

> Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. . . . The Arbitration Act establishes that, as a

> matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.

460 U.S. at 24-25.

Second, this Court in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), confirmed what it had already stated in *Moses H. Cone*, that the Arbitration Act is federal substantive law applicable in state as well as federal court. In *Southland*, this Court reversed the Supreme Court of California's holding that claims based on that state's franchise law were excluded from coverage under an agreement to arbitrate. Chief Justice Burger wrote for the Court:

> Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate. . . . In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.

465 U.S. at 7, 10.

Southland was followed by *Perry v. Thomas*, 482 U.S. 483 (1987), in which the Court reiterated its holding that a state law withdrawing certain claims from arbitration must give way to the federal policy favoring arbitration. Of particular relevance to the present case, Justice Marshall wrote for the Court that a state court "may not . . . in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." 482 U.S. at 492 n.9.

Third, this Court has made clear that it will not read implied exceptions into the broad coverage of the Arbitration Act. In *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), the Court had to confront the question whether the rule of *Wilko v. Swan*, barring arbitration claims under the securities laws (or at least

under the Securities Act of 1933) applied to a securities-law claim arising out of an international transaction. This Court upheld the agreement to arbitrate in Paris:

> The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would as well, reflect a "parochial concept that all disputes must be resolved under our laws and in our courts."

417 U.S. at 519 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972)).

In *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), the Court was faced with the "intertwining" of arbitrable state law claims and claims under the Securities Act of 1933, then believed nonarbitrable. The Court of Appeals for the Ninth Circuit had held that since the federal claims were not arbitrable, the state law claims should not be arbitrated either. Again, the question was not free from doubt, but again this Court made the pro-arbitration decision, ordering that the arbitrable claims be arbitrated without delay even if some duplication of work resulted. Justice Marshall wrote for the Court:

> The preeminent concern of Congress in passing the [Arbitration] Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is "piecemeal" litigation, at least absent a countervailing policy manifested in another federal statute. . . . By compelling arbitration of state-law claims, a district court successfully protects the contractual rights of the parties and their rights under the Arbitration Act.

470 U.S. at 221.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), this Court again refused to exclude a class of cases from the reach of the Arbitration Act. *Mitsubishi* concerned a controversy between a Japanese manufacturer and an

automobile dealer in Puerto Rico that raised counterclaims under United States antitrust laws and a Puerto Rico dealers' protection statute. The Court of Appeals for the First Circuit held the antitrust claims nonarbitrable and separated them from the other claims and counterclaims. Notwithstanding support for that position by the State and Justice Departments, this Court reversed, holding that all claims must be submitted to arbitration under an agreement that called for arbitration in Tokyo under auspices of the Japan Commercial Arbitration Association and for application of Swiss law. Building on *Prima Paint*, *Scherk*, *Moses H. Cone*, and *Southland*, Justice Blackmun wrote for the Court:

> [W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution. . . . Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies. . . .

473 U.S. at 626-628.

Thereafter in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), the Court cleared up the remaining doubt about the arbitrability of securities claims, expressly holding that claims under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78*ll*, were not excluded from the scope of the Federal Arbitration Act, that RICO claims were not exempt from the Act, and finally that claims under the Securities Act of 1933 were not exempt and that *Wilko v. Swan* was expressly overruled. As the Court said in *McMahon*,

> [T]he mistrust of arbitration that formed the basis for the *Wilko* opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time.

482 U.S. at 233. *See also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (enforcing agreement to arbitrate claim

under Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634).

In sum, this Court has rejected—not once but repeatedly—what Judge Jerome Frank called "the old judicial hostility to arbitration." *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942). The Court has heard all the arguments against enforcing agreements to arbitrate and has rejected all of them. The present case reflects a last pocket of resistance based on an unsound construction of the Arbitration Act. There is no reason for the Court to change its course in this case, and every reason to maintain its "healthy regard for the federal policy favoring arbitration." *Moses H. Cone*, 460 U.S. at 24.

II.

The Arbitration Act Extends to the Limits of the Powers of Congress under the Commerce Clause.

There can be no serious doubt today that the transaction at issue here—a service contract between a resident of Alabama and a company incorporated and having its principal place of business in another state, operating a termite-control business that extends throughout the United States, and using pesticides that have been transported in from several different states—is within Congress's power to regulate under the Commerce Clause. *See, e.g., Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *United States v. Sullivan*, 332 U.S. 689, 697-98 (1948); *Wickard v. Filburn*, 317 U.S. 111 (1942); *see also Barrett v. United States*, 423 U.S. 212 (1976). Indeed, neither the Supreme Court of Alabama nor, as we understand it, the Respondents in this case, contend that applying the Federal Arbitration Act to the present case would be unconstitutional.[1] The question, rather, is whether

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[1] The statement in *Bernhardt v. Polygraphic Company of America*, 350 U.S. 198 (1956), that the petitioner in that case—who entered into an employment contract that required him to relocate his residence across state lines—was not

(continued...)

the "commerce" provision of the Arbitration Act—like that of most statutes regulating interstate commerce—requires only that the transaction have an effect on commerce, or whether there is a "distinct standard unique to the application of the FAA." *Ex parte Warren*, 548 So. 2d 157, 160 (Ala.), *cert. denied*, 493 U.S. 998 (1989).

There is no basis in the prior decisions of this Court construing the Arbitration Act, in the language or legislative history of the Act, or in the Court's construction of other pre-New Deal legislation to support the artificially narrow construction that the Alabama Supreme Court has given the Act. All these sources make clear that the Act operates to the full reach of Congress's commerce power.

A. Congress Intended to Give the Broadest Possible Scope to the Arbitration Act.

This Court has already expressly stated that the Arbitration Act is

> a statute that embodies Congress' intent to provide for the enforcement of arbitration agreements within *the full reach of the Commerce Clause*.

Perry v. Thomas, 482 U.S. 483 at 490 (1987) (emphasis added). The legislative history of the Arbitration Act confirms that Congress intended to validate arbitration agreements to the full extent of its Commerce Clause powers. The congressional committee reports relating to the Arbitration Act, ch. 213, 43 Stat. 883 (1925), show no concern with the "local" or "national" character of the transactions governed by the Act, apart from a desire not to exceed the powers of Congress under the Constitution. The reports focus instead on Congress's disapproval of the

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[1](...continued)
"engaging in activity that affected commerce" is inconsistent with Congress's intent and with this Court's decision in *Prima Paint* and has been implicitly rejected in this Court's subsequent cases.

"anachronism of American law" by which courts at that time refused to specifically enforce arbitration agreements. H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924); S. Rep. No. 536, 68th Cong., 1st Sess. 2-3 (1924); *see also Southland*, 465 U.S. at 13 (discussing legislative history). As this Court summarized in *Perry v. Thomas*, the Arbitration Act's "general applicability reflects that '[t]he preeminent concern of Congress in passing the act was to enforce private agreements into which parties had entered. . . .' " 482 U.S. at 490 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

By adopting the Act in 1925, Congress sought to eradicate what even then was the "anachronism" of hostility to arbitration in all transactions within the field of its legislative competence.[2] The House Judiciary Committee concluded in its report that

> [t]he control over interstate commerce [one of the bases for the legislation] reaches not only the actual physical interstate shipment of goods but also contracts *relating to* interstate commerce.

H.R. Rep. No. 96, *supra*, at 1 (emphasis added), *quoted in Prima Paint Corp.*, 388 U.S. at 401 n.7. The brief of the American Manufacturers' Export Association of New York, submitted in support of the legislation to the House and Senate committees,

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[2] Julius Henry, who drafted the Arbitration Act bill for the American Bar Association, testified that the Act was the federal portion of a plan to "destroy the anachronism in the law" across the board; as he explained, "This is in three segments: The first is to get a State statute, and then to get a Federal law to cover interstate and foreign commerce and admiralty, and, third, to get a treaty with foreign countries." *Joint Hearings before the Subcommittees of the Committees on the Judiciary on S. 1005 and H.R. 646*, 68th Cong., 1st Sess. 16 (1924), *quoted in Prima Paint*, 388 U.S. at 405 n.13. Charles L. Bernstein of the New York Chamber of Commerce, another supporter of the bill, explained that the proposed legislation "follows the lines of the New York arbitration law, applying it to the fields wherein there is Federal jurisdiction. These fields are in admiralty and in foreign and interstate commerce." *Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary*, 67th Cong., 4th Sess. 2 (1923), *quoted in id.*

reflects the same contemporaneous understanding that the Act reaches to the limit of Congress's Commerce Clause powers:

> It is not only the actual and physical interstate shipment of goods which is subject to the interstate commerce powers of the Federal Government, but these powers govern every agency or act which bears so close a relationship to interstate commerce that they can reasonably be said to *affect* it. Contracts *relating to* interstate commerce are within the regulatory powers of Congress.

Joint Hearings before the Subcommittees of the Committees on the Judiciary on S. 1005 and H.R. 646, 68th Cong., 1st Sess. 38 (1924) (emphasis added).

This Court was thus fully justified in holding in *Prima Paint* that the Arbitration Act is substantive federal law "based upon . . . the incontestable federal foundations of control over interstate commerce," 388 U.S. at 405, and in *Southland* that

> the "involving commerce" requirement in § 2 [is] not . . . an inexplicable limitation on the power of the federal courts, but . . . a *necessary* qualification on a statute intended to apply in state and federal courts.

465 U.S. at 14-15 (emphasis added); *see also Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983).

B. There Is No Reason To Apply a Different Standard to the Arbitration Act Than to Other Acts of Congress Enacted Pursuant to the Commerce Power.

The contention in support of the decision of the Alabama Court's decision is essentially that

> the standard here applicable is not the "regulating standard" of "affecting interstate commerce", rather, the test for determining whether the transaction involves interstate

> commerce is a distinct standard unique to the application of the FAA.

Ex parte Warren, 548 So. 2d 157, 160 (Ala.), *cert. denied*, 493 U.S. 998 (1989). Once "the outmoded presumption of disfavoring arbitration proceedings" is rejected, however, *Rodriguez de Quijas*, 490 U.S. at 481, there is no reason to adopt a "distinct standard unique to . . . the FAA," *Ex parte Warren*, 548 So. 2d at 160.

In fact, the Alabama Supreme Court itself has stated that its long-standing hostility to arbitration has motivated its adoption of the "contemplated substantial interstate activity" test.[3] In explaining why it has preferred that test, which it had adopted in *Ex parte Warren*, instead of a "slightest nexus with interstate commerce" test, the Alabama Supreme Court has explained: "The standard in *Warren* better promotes our strong public policy *against* the use of predispute arbitration agreements." *Lopez v. Home Buyers Warranty Corp.*, 628 So. 2d 361, 363 n.2 (Ala. 1993) (emphasis added), *petition for cert. filed*, 62 U.S.L.W. 3430 (U.S. Dec. 22, 1993) (No. 93-995); *see also Old Republic Ins. Co. v. Lanier*, No. 1921387, 1994 Ala. LEXIS 276, *15, 1994 WL 154193, *5 (Ala. Apr. 29, 1994) ("To comport with our strong policy against arbitration, we must adopt a narrow standard for determining when the FAA applies . . .").[4]

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[3] Alabama's policy against arbitration, presently embodied in Ala. Code § 8-1-41(3) (1975) (providing that predispute arbitration agreements cannot be specifically enforced), has its roots in the jealousy with which English and American courts formerly viewed agreements to "oust the courts of their jurisdiction." *H. L. Fuller Constr. Co. v. Industrial Dev. Bd.*, 590 So. 2d 218, 221 (Ala. 1991). This hostility to arbitration seems to have first appeared in Alabama in *Bozeman v. Gilbert*, 1 Ala. 90 (1840), in which the Alabama Supreme Court refused to enforce an arbitration agreement in a case relating to an alleged breach of warranty in the sale of a jackass.

[4] The Alabama Supreme Court's antipathy toward arbitration agreements has come to this Court before. In *Ex parte Alabama Oxygen Co.*, 433 So. 2d 1158 (Ala. 1983), the Alabama Supreme Court rejected as dicta the statement in *Moses*

(continued...)

The interpretation of a federal statute is, however, a question of federal law. Apart from hostility to arbitration, which this Court has decisively rejected, there is no justification in history or logic for construing the words of the Arbitration Act as the Alabama Supreme Court has done. In exercising its powers over interstate commerce, Congress, legislating at different times and with different drafters, has used such words as "affecting" interstate commerce, as in the National Labor Relations Act, 29 U.S.C. § 160(a), or "involving" commerce, as in the Arbitration Act, 9 U.S.C. § 1, or has referred merely to the "use of any means or instrumentality of interstate commerce," as in the Securities Exchange Act, 15 U.S.C. § 78j, or to "restraint of trade or commerce among the several States," as in the Sherman Antitrust Act, 15 U.S.C. § 1.[5] While the interpretation of the commerce power has had its ups and downs since the groundbreaking decision in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), it would be wholly arbitrary to assign different categories of application to different enactments of Congress on the basis of the

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[4](...continued)
Cone that the Arbitration Act applies in state courts, and refused to enforce an arbitration clause in a construction contract. After deciding *Southland Corp. v. Keating*, this court vacated the judgment in *Alabama Oxygen* and remanded the case for reconsideration. *York Int'l v. Alabama Oxygen Co.*, 465 U.S. 1016 (1984). On remand, the Alabama Supreme Court reversed its original decision as required by *Southland*. *Ex parte Alabama Oxygen Co.*, 452 So. 2d 860 (Ala. 1984). As the present case and other recent decisions of that court have shown, however, it has not abandoned its attempts to narrow the scope of the Arbitration Act in order to defeat agreements to arbitrate.

[5] Justice Black's statement, in his dissent in *Prima Paint*, 388 U.S. at 410, that "affect commerce" is "the statutory language Congress normally uses when it wishes to exercise its full powers over commerce," is therefore unpersuasive. The relevant language in both of the statutes that Justice Black cited as examples was enacted during the 1930s, a decade or more after the Arbitration Act was passed. *See* National Labor Relations Act, ch. 372, § 2, 49 Stat. 450 (1935) (codified as amended at 29 U.S.C. § 152); Act of Aug. 11, 1939, ch. 685, § 1, 53 Stat. 1404 (adding provision containing "affecting commerce" language to Federal Employers' Liability Act, codified as amended at 45 U.S.C. § 51).

particular words that Congress used to identify the constitutional limits of its commerce powers in any particular statute.

Even if Congress, when enacting the Arbitration Act, had not understood the extent of its Commerce Clause powers as does the Congress of today, there would be no reason to leave the scope of the Arbitration Act frozen as of 1925 in view of Congress's evident intent to extend the Arbitration Act to all transactions within its commerce power. Congress's explicit rejection of hostility to arbitration obviously did not stop at the edge of a pre-New Deal understanding of its Commerce Clause powers. As this Court's decisions have recognized, older federal statutes such as the Arbitration Act should not be subjected to now-discredited limitations on Congress's powers that prevailed when Congress enacted those statutes, but should be interpreted in view of modern, more expansive notions of those powers.

For example, this Court has expressly recognized that the Sherman Antitrust Act, 15 U.S.C. §§ 1-7, adopted in 1890, must be allowed to expand along with the Court's interpretation of the Commerce Clause. *E.g., McLain v. Real Estate Bd.*, 444 U.S. 232, 241 (1980); *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 743 n.2 (1976). Shortly before the Sherman Act was enacted, this Court had held that the regulation of manufacturing was not within Congress's commerce powers. *Kidd v. Pearson*, 128 U.S. 1 (1888). Soon after Congress enacted the Sherman Act, the Court held that a scheme to monopolize the manufacture of sugar was outside the reach of Congress's commerce powers and therefore not subject to the Sherman Act, even though the manufacturers sold the sugar in interstate commerce. *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895). Nonetheless, after this Court in *United States v. Darby*, 312 U.S. 100, 113-117 (1941), had laid to rest the notion that Congress's commerce powers did not extend to the regulation of manufacturing, the Court had no difficulty in applying the Sherman Act to a scheme to monopolize sugar manufacture in *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 229-31 (1948) (criticizing *E.C. Knight*).

There is no sound basis for imposing any greater restrictions on the Arbitration Act than on other Congressional enactments pertaining to interstate commerce. This Court should make clear that an agreement to arbitrate in any commercial transaction within the scope of Congress's commerce powers is within the scope of the Arbitration Act.

C. Congress has Repeatedly Adopted a Stance in Favor of the Expanded Use of Arbitration to Resolve Commercial Disputes.

Congress has shown in numerous ways that it concurs fully with the statement of this Court that "Section 2 [of the Arbitration Act] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone*, 460 U.S. at 24. Congress has made no effort to limit arbitration of commercial disputes, nor has it expressed any disapproval of the broad construction that this Court and other courts have given the first chapter of the Arbitration Act, 9 U.S.C. §§ 1-14, which remains essentially unchanged from 1925. Indeed, Congress has looked with favor on the trend toward widening the use of arbitration in commercial disputes and has participated in that trend in several areas.

In the international sphere, Congress has enacted legislation implementing the New York and Panama Conventions, designed to facilitate the enforcement of international arbitration agreements and awards. 9 U.S.C. §§ 201-208 (enacted 1970); *id.* §§ 301-306 (enacted 1990). Congress has also legislated to prevent foreign governments from invoking the "act of state" doctrine to avoid the enforcement of arbitration agreements and awards. 9 U.S.C. § 15 (enacted 1988).

Congress has endorsed the expanded use of arbitration in domestic transactions as well. For instance, when Congress established the Commodity Futures Trading Commission in 1974 to oversee registered futures associations, it required as one of the

conditions for registration and approval of such an association that its rules provide for a "fair and equitable procedure through arbitration or otherwise for the settlement of a customer's claims and grievances. . . ." Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, sec. 301, § 17(b)(10), 88 Stat. 1389, 1408-09 (adding § 17(b)(10) to the Commodity Exchange Act, 7 U.S.C. § 21(b)(10)). Initially, arbitration of customer disputes was limited to claims up to $5,000, but in 1978 the sum was increased to $15,000,[6] and in 1982, the limit on arbitrable customer's claims was deleted altogether,[7] with a view to enhancing the attractiveness of arbitration as a "viable forum for resolving customer claims." H.R. Rep. No. 565, 97th Cong., 2d Sess., part 1, at 56, *reprinted in* 1982 U.S.C.C.A.N. 3871, 3905.

To take another example, until the 1980s it was generally assumed that controversies over the validity or infringement of patents were not arbitrable, and several courts had so held. *See* P. Carmichael, *The Arbitration of Patent Disputes*, 38 Arb. J. 1, 3 nn. 3, 4, 5, 8 (March 1983) (citing cases). But when Congress considered the question in 1982, it expressly provided that parties to a dispute about the validity or infringement of a patent could agree in writing to settle such a dispute by arbitration in accordance with the Federal Arbitration Act. 35 U.S.C. § 294. The Report of the House Judiciary Committee accompanying the legislation stated:

> In the view of the Committee, a statutory authorization of voluntary agreements to arbitrate validity and infringement disputes would benefit both the parties to these disputes and the public.
>
> Statutory endorsement of arbitration agreements would assure the parties that they could avail themselves of the

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[6] Futures Trading Act of 1978, Pub. L. No. 95-505, § 22(2), 93 Stat. 865, 876.

[7] Futures Trading Act of 1982, Pub. L. No. 97-444, § 217(b), 96 Stat. 2294, 2307.

> numerous advantages of arbitration without the possibility of having to reargue the dispute in court. The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices; and, arbitrators are frequently better versed than judges and juries in the area of trade customs and the technologies involved in these disputes.
>
> The enforcement of voluntary arbitration provisions would serve the public in two ways. First, the availability of arbitration with its numerous advantages will enhance the patent system and thus will encourage innovation. . . . Secondly, arbitration could relieve some of the burdens on the overworked Federal courts. . . .

H.R. Rep. No. 542, 97th Cong., 2d Sess. 13, *reprinted in* 1982 U.S.C.C.A.N. 765, 777.

In 1988, on recommendation of the Judicial Conference of the United States and the American Bar Association, Congress enacted 9 U.S.C. § 16, to allow immediate appeal from a District Court order denying a stay of litigation pending arbitration or denying a petition to compel arbitration, and to preclude appeal from an order granting a stay of litigation pending arbitration or directing arbitration to proceed. The purposes of this amendment included reinforcing the policy favoring arbitration by reducing the opportunity for a party to block or delay arbitration. *See* Mem. of Sen. Heflin, 134 Cong. Rec. S 16299 (daily ed. Oct. 14, 1988).

In short, Congress, like this Court, has seen the advantages of arbitration of commercial disputes pursuant to agreement, and has given no support to those who regard arbitration as "second class justice."

III.

The Arbitration System Provides a Fair, Effective and Expeditious Means of Resolving Disputes.

The experience of the last several decades demonstrates that arbitration is fair both to consumers and to other disputants. Based on its extensive experience in the administration of cases as well as its continuing surveys of user satisfaction, the AAA can confirm that arbitration provides due process and fair results to those who use it to resolve their disputes—whether large or small, rich or poor. The Appendix to this brief shows the geographic distribution of commercial disputes submitted to the Association in calendar year 1993, a breakdown of claims by dollar amounts, and a breakdown of the time elapsed from filing to award by the size of the claim. Of course the AAA's statistics do not include all controversies submitted to arbitration in the United States. But the sample is large enough to support the conclusion that arbitration of commercial disputes is practiced in all regions of the country, that it comprehends many small and medium-sized claims, and that in comparison with ordinary civil litigation in the United States (and particularly in comparison with jury trials), arbitration is substantially faster and therefore substantially less expensive.

A. Studies Have Demonstrated Widespread Satisfaction with Arbitration.

Studies conducted by the AAA and other organizations demonstrate widespread user satisfaction with the arbitration process. In 1985, a comprehensive survey was conducted jointly by the Dispute Avoidance and Resolution Subcommittee of the Forum Committee on the Construction Industry and the Construction Committee of the Litigation Section of the American Bar Association. Kenneth M. Cushman & Robert A. Rubin, *Report to the Membership of the Forum Committee on the Construction Industry*, Construction Lawyer, August 1987, at 9; *see also* Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 Ind. L.J. 425 (1988). The resulting data represented the opinions of

some 600 attorney-members of these groups experienced in arbitration. For each of a number of categories related to speed, cost and quality, over two-thirds of those responding to the survey rated arbitration equal or superior to both jury trials and bench trials. Significantly, with regard to fairness of decision, 81.5% stated that arbitration was the same as or better than a jury trial, and 75.1% stated that arbitration was the same as or better than a bench trial. With regard to predictability of result, 77.8% rated arbitration as equal or superior to jury trials, and 69.9% rated arbitration as equal or superior to bench trials.

A portion of the survey focused on the reactions of the parties in interest, as well as their counsel, in construction cases in which the amount in dispute was less than $250,000. The survey asked the parties to rate their overall experience with arbitration in the areas of speed, economy, qualification of the arbitrators and fairness of the decision. In every one of those categories, over half of the parties responding to the survey rated their overall experience with the arbitration process as "excellent" or "good" (rather than "fair," "poor" or "very poor") in cases under $250,000. The parties' attorneys expressed similarly high levels of satisfaction with arbitration.[8]

A similar survey of attorney satisfaction with the arbitration process was conducted in 1988 by a joint task force of the Association of the Bar of the City of New York Arbitration and Alternative Dispute Resolution Committee, the New York County Lawyers' Association Arbitration and Alternative Dispute

[8] For construction disputes under $250,000, the following percentages of parties and attorneys rated their experience with the process as excellent or good in the various categories: time in which the case was first scheduled for hearing, parties 74.7%, attorneys 73.8%; speed of actual hearing, parties 67.7%, attorneys 77.1%; speed of arbitrators' decision, parties 71.7%, attorneys 74.6%; as an economic means of resolving disputes, parties 56.6%, attorneys 66.4%; qualification of arbitrators, parties 56.7%, attorneys 68.0%; fairness of decision, parties 52.7%, attorneys 51.7%. Attorneys but not parties were also asked about predictability of result; in this category, 42.8% rated arbitration as excellent or good.

Resolution Committee, and the AAA, focusing this time on participants in the larger, more complex commercial arbitrations. American Arbitration Ass'n, *Report and Recommendation of the Joint AAA Task Force on Procedures for Large, Complex Commercial Arbitrations* (1988). Attorneys were asked to rate their experience in arbitration, as compared with court trials, on a scale of one to five. With one exception (predictability of result in comparison with a federal bench trial), the average response rated arbitration above the midpoint of 3.0 in every category of performance (overall performance, time from start to finish, fairness of proceedings, predictability of result and overall cost including attorneys' fees) in comparison with every category of court trial (federal court bench trial, federal court jury trial, state court bench trial and federal court jury trial).

The Judicial Council of California has also conducted a study comparing arbitration to court resolution. The study, which looked at automobile insurance disputes, concluded that arbitration is faster, less expensive and about as fair and predictable as court adjudication, and has a high rate of acceptability among attorneys and insurance professionals. Judicial Council of California, *A Study of the Role of Arbitration in the Judicial Process* 74 (1972).

B. Arbitration Provides Consumers As Well As Business Firms a Fair, Speedy and Economical Forum To Resolve Their Disputes with Providers of Goods and Services.

The American Arbitration Association, as part of its organizational mission, administers thousands of arbitration cases of all types each year. Many of these cases are small, routine commercial matters, analogous to the dispute in the case at bar. As shown in the Appendix, of the 12,713 commercial cases that the Association administered in 1993, 8697, or 68%, involved claims of less than $50,000, and over half of those involved claims of less than $10,000. Most cases in which the claim was less than $50,000 were concluded in a single hearing, with an average time of 183 days (and a median time of 133 days) from the filing of the

claim to the issuance of the award. For cases in which the claim amount was less than $15,000, the average time from filing to award was 119 days, and the median time was 90 days.

The AAA regularly conducts consumer arbitrations in several areas, such as automobile "lemon laws." In these cases, too, the Association's experience demonstrates that arbitration can be a speedy, economical and fair way to make the consumer whole.

For example, the New York State Attorney General's Office oversees a "lemon law" arbitration program administered by the Association, and issues an annual report on the results. The data collected for 1993 indicate that the average disposition time (from filing to award) was 40 days for new-car cases and 54 days for used-car cases. Over the seven-year life of the new-car program and the four-year life of the used-car program, consumers prevailed in 56% of the new-car cases and 59% of the used-car cases. *See* N.Y. State Dep't of Law, *New York New Car Lemon Law Arbitration Program 1993 Annual Report*; N.Y. State Dep't of Law, *New York Used Car Lemon Law Arbitration Program 1993 Annual Report*. The State of Florida's "lemon law" arbitration program, which is not administered by the AAA, has shown similar success. *See* State of Fla. Office of Att'y Gen., *Lemon Law Arbitration Program Annual Report 1992*.

There is no reason to believe that a claim by a homeowner against a provider of extermination services, such as in the present case, would not be handled with equal fairness. Experience demonstrates that arbitration fulfills its promise of speed, economy and justice in regard to a broad range of commercial disputes. The support for the arbitral process that this Court and Congress have shown is well justified, and the fear of arbitration reflected in the decision of the Alabama Supreme Court in this and other cases has no factual support.

IV.

This Court Should Reject The Standard Adopted by the Alabama Supreme Court, Which Encourages "Litigation About Litigation" and Frustrates Congress's Intent.

As this Court has recognized, one of the chief reasons that parties choose arbitration is to avoid the delay and expense associated with litigation. *Southland Corp. v. Keating*, 465 U.S. at 7. The Arbitration Act was a congressional response to "agitation against the costliness and delays of litigation." H.R. Rep. No. 96, 68th Cong. 1st Sess. 1, 2 (1924). As the Senate report accompanying the legislation noted:

> The desire to avoid the delay and expense of litigation persists. . . . The settlement of disputes by arbitration appeals to big business and little business alike, to corporate interests as well as to individuals.

S. Rep. No. 536, 68th Cong. 1st Sess. 1, 3 (1924).

The Alabama Supreme Court's standard, which ties the application of the Act to the supposed factual issue of whether the parties "contemplated substantial interstate commerce" at the time they made the agreement to arbitrate, is particularly likely to cause extensive pre-arbitration litigation, in that it invites extensive judicial inquiry into the facts and circumstances surrounding an agreement to arbitrate and is substantially uncertain in its application to a wide range of cases. The volume of litigation on this question in Alabama demonstrates that such a standard is unsound and unworkable: in the past three years, the state's highest court has decided at least fourteen cases in which the "commerce" requirement of the Arbitration Act was a significant issue, including six cases in July and August of 1993 alone.[9]

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[9] In addition to the present case, decided August 13, 1993, these cases are *Ex parte Kent Corp.*, No. 1930240, 1994 Ala. LEXIS 97, 1994 WL 63458 (Ala. Mar. 4, 1994); *Ex parte Lorance*, 632 So. 2d 475 (Ala. Feb. 11, 1994); (continued...)

No matter how any particular case comes out, any standard that leads to fourteen cases in three years being taken to the state's highest court on the preliminary question of whether an agreement to arbitrate should be enforced frustrates the promise of arbitration and the intent of Congress to provide an expeditious and efficient means to resolve disputes. In the states that have adopted the "contemplated substantial interstate activity" standard, which was first suggested by Judge Lumbard in his concurring opinion in *Metro Industrial Painting Corp. v. Terminal Construction Co.*, 287 F.2d 382, 386 (2d Cir.), *cert. denied*, 368 U.S. 817 (1961), the result has been to create incentives to litigate about the applicability of the Federal Arbitration Act.[10] This has been true even in those states that permit specific enforcement of agreements to

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[9](...continued)
Henderson v. Superior Ins. Co., 628 So. 2d 365 (Ala. Aug. 20, 1993); *Lopez v. Home Buyers Warranty Corp.*, 628 So. 2d 361 (Ala. Aug. 20, 1993), *petition for cert. filed*, 62 U.S.L.W. 3430 (U.S. Dec. 22, 1993) (No. 93-995); *Terminix Int'l Co. Ltd. Partnership v. Jackson*, 628 So. 2d 357 (Ala. Aug. 13, 1993), *petition for cert. filed*, 62 U.S.L.W. 3430 (U.S. Dec. 22, 1993) (No. 93-1000); *Ex parte Jones*, 628 So. 2d 316 (Ala. July 16, 1993); *Continental Grain Co. v. Beasley*, 628 So. 2d 319 (Ala. July 16, 1993); *First Real Estate Corp. v. Brown Marx Tower Ltd. Partnership*, 620 So. 2d 648 (Ala. May 7, 1993); *Garikes, Wilson & Atkinson, Inc. v. Episcopal Found. of Jefferson County, Inc.*, 614 So. 2d 447 (Ala. Mar. 5, 1993); *A.J. Taft Coal Co. v. Randolph*, 602 So. 2d 395 (Ala. July 31, 1992); *Ex parte Brice Building Co.*, 607 So. 2d 132 (Ala. July 17, 1992); *Maxus, Inc. v. Sciacca*, 598 So. 2d 1376 (Ala. May 15, 1992); *Ex parte Clements*, 587 So. 2d 317 (Ala. Aug. 30, 1991).

[10] *See, e.g., ESAB Automation, Inc. v. Hesco Sales, Inc.*, 582 So. 2d 810, 810 (Fla. App. 1991); *United Servs. Gen. Life Co. v. Bauer*, 568 So. 2d 1321, 1322-23 (Fla. App. 1990); *Acton CATV, Inc. v. Wildwood Partners, Ltd.*, 508 So. 2d 1274, 1275-76 (Fla. App.), *review denied*, 518 So. 2d 1273 (Fla. 1987); *Riverfront Properties Ltd. v. Max Factor III*, 460 So. 2d 948, 952-54 (Fla. App. 1984); *R.J. Palmer Constr. Co. v. Wichita Band Instrument Co.*, 642 P.2d 127, 130-31 (Kan. App. 1982); *Loche v. Dean Witter Reynolds, Inc.*, 526 N.E.2d 1296, 1299-1300 (Mass. App. Ct. 1988); *Burke County Public Schools Bd. of Educ. v. Shaver Partnership*, 279 S.E.2d 816, 822 (N.C. 1981); *Paramore v. Inter-Regional Fin. Group Leasing Co.*, 316 S.E.2d 90, 92 (N.C. App. 1984); *Cohoon v. Ziman*, 298 S.E.2d 729, 730-31 (N.C. App.), *review denied*, 301 S.E.2d 388 (N.C. 1983).

arbitrate, because of exceptions or procedural or jurisdictional quirks in the state arbitration statutes.[11]

Though the Alabama Supreme Court's standard is particularly damaging, any standard that generates significant uncertainty about the scope of the Arbitration Act has the potential to defeat the advantages of speed and economy that prompt parties to choose arbitration. Only by recognizing that the Arbitration Act extends to the limits of Congress's Commerce Clause powers can this Court give full effect to

> Congress' clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.

Moses H. Cone, 460 U.S. at 22.

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[11] *See, e.g., Action CATV*, 508 So. 2d at 1275-76 (refusing to order arbitration under Federal Arbitration Act because parties did not contemplate substantial interstate activity, and under Florida arbitration statute, because contract called for arbitration in another state); *Riverfront Properties*, 460 So. 2d at 952-54 (refusing to apply Federal Arbitration Act for same reason; Florida law did not permit enforcement of agreement to arbitrate because contract contained choice-of-law clause specifying another state's law); *Paramore*, 316 S.E.2d at 92 (refusing to apply Federal Arbitration Act for same reason; North Carolina law required pre-arbitration judicial decision on defenses of fraud, undue influence and unconscionability).

CONCLUSION

For the reasons stated, this Court should make clear that in all commercial transactions within the reach of Congress's commerce powers, an agreement to arbitrate will be enforced in accordance with the Arbitration Act.

Accordingly, the Association respectfully urges the Court to reverse the judgment of the Supreme Court of Alabama and remand the case for further proceedings consistent with the principles discussed herein.

Respectfully submitted,

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May 19, 1994

APPENDIX

AAA COMMERCIAL CASE REPORT

January 1993 to December 1993

Geographical Distribution

AAA Office	Number of Cases Filed	Total Amount of Claims and Counterclaims
Atlanta	231	$ 68,596,374.42
Boston	408	773,569,038.51
Charlotte	166	43,461,731.92
Chicago	469	108,549,139.18
Cincinnati	221	52,621,715.03
Cleveland	168	107,173,186.30
Dallas	336	170,807,393.07
Denver	224	595,428,251.56
Detroit	399	92,795,730.54
Garden City	172	30,502,055.30
Hartford	232	32,746,664.24
Hawaii	184	299,132,315.15
Houston	152	144,738,466.54
Kansas City	100	24,179,518.94
Las Vegas	56	13,690,374.61
Los Angeles	1,631	621,765,580.34
Miami	537	102,786,765.46
Minneapolis	666	20,008,504.57
Nashville	75	14,458,804.31
New Jersey	394	80,906,176.78
New Orleans	113	78,364,709.49
New York	1,105	1,052,054,582.21
Orange County	385	55,416,993.99
Orlando	191	49,396,276.98

Philadelphia	380	71,984,959.42
Phoenix	203	22,885,158.53
Pittsburgh	212	121,319,103.28
Providence	34	4,483,858.42
Salt Lake	94	9,451,416.13
San Diego	405	73,848,690.65
San Francisco	1,505	780,430,100.79
Seattle	367	50,537,746.40
St. Louis	86	37,040,834.14
Syracuse	187	19,235,043.30
Washington, D.C.	504	234,109,184.79
White Plains	121	19,252,946.22
TOTAL	12,713	$ 6,077,729,391.51

Breakdown of Amounts of Claims

Amount of Claims	Number of Cases Filed	Percent of Cases Filed
$1 - $10,000	4,442	35%
$10,001 - $50,000	4,255	33%
$50,001 - $100,000	1,022	8%
$100,001 - $500,000	1,737	14%
$500,001 - $1,000,000	260	2%
$1,000,000 and over	372	3%
No Amount Disclosed	625	5%

1993 PROCESSING TIME (IN DAYS) FROM FILING TO AWARD IN AAA COMMERCIAL CASES

Claim Amount	No. of Cases	Avg. No. of Days	Median No. of Days	Avg. No. of Hrgs.
$1 - $15,000	1654	119	90	1
$15,001 - $50,000	1012	183	133	1
$50,001 - $100,000	283	293	232	1
$100,001 - $500,000	451	312	245	2
$500,001 - $1,000,000	86	496	384	3
Over $1,000,000	113	475	328	4
Undetermined	727	249	169	1
OVERALL	4,326	204	133	1